

NO. 78-1675

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

GUILLERMO LUJAN, MYRNA LUJAN, SUNSHINE
BAIL BONDING COMPANY, and STUYVESANT
INSURANCE COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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OPINION BELOW

The Opinion of the Court of Appeals,
which is unreported, appears in the Appendix
hereto.

JURISDICTION

The judgment of the Court of Appeals
for the Ninth Circuit was entered on
December 11, 1978. A timely Petition for
Rehearing was denied on February 9, 1979,
and this Petition for Certiorari was filed
within ninety (90) days of that date.
This Court's jurisdiction is invoked under
28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the entry of judgment on the
bond posted for Petitioner Guillermo Lujan,
arising out of his failure to appear at a

proceeding, meets applicable Due Process standards when there was no actual notice given of that proceeding and when the circumstances show that the proceeding did not take place in the normal course of Lujan's prosecution.

STATEMENT OF THE CASE

On November 29, 1977, Petitioner Guillermo Lujan, together with a number of other individuals, was indicted in two separate cases. They were numbers CR-77-483 and CR-77-484, United States District Court for the District of Arizona (Tucson). Petitioner Lujan was released in both cases on December 7, 1977, on stipulation of counsel. The stipulated bond was a \$30,000.00 bond consisting of one \$15,000.00 surety bond posted by Petitioner Sunshine Bail Bond on behalf of Petitioner Stuyvesant

Insurance Company, and one \$15,000.00 cash bond. The same bond was to apply in both CR-77-483 and CR-77-484. At that same, release proceeding Petitioner Lujan was directed to appear for arraignment on December 8, 1977, at 1:30 p.m. in both cases.

On December 8, 1977, Petitioner Lujan appeared at his arraignment. The trial was set in CR-77-483 for Tuesday, January 31, 1978, at 9:00 a.m. The trial date in CR-77-484 was set on Wednesday, January 18, 1978, at 9:00 a.m.

On December 13, 1977, a superseding indictment was filed in both cases which was substantially the same as the preceding indictment. On December 14, 1977, a Notice of setting CR-77-484 for arraignment on December 20, 1977, at 1:30 p.m. was filed as to the Petitioner Lujan. On December 15, 1977, a notice of setting CR-77-483 for arraignment on December 20, 1977, at

1:30 p.m. was also filed as to Petitioner Lujan.

On December 20, 1977, the Petitioner Lujan appeared at his arraignment in both cases and the same trial dates as set at the prior arraignment were confirmed.

On January 3, 1978, a number of Motions were heard in CR-77-484. At that proceeding, the trial date of January 18, 1978, was vacated and the matter was reset for jury trial on February 14, 1978, at 9:00 a.m. The Petitioner Lujan was not present at that proceeding.

On January 9, 1978, a hearing was had on a number of similar motions in CR-77-483. A Motion to Continue was taken under submission on that date and was granted on January 10, 1978. The trial date of January 31, 1978, was vacated and the matter was reset for trial on February 22, 1978, at 9:00 a.m. The Petitioner Lujan was not

present at that hearing either.

On January 10, 1978, a second superseding indictment was filed in both cases. This brought the total number of indictments filed in each case to three.

On Thursday, January 12, 1978, a notice of setting the case for arraignment in both CR-77-483 and CR-77-484 was filed. The date of arraignment specified in the notice was January 19, 1978. The aforementioned notices of arraignment were not received by counsel for the Petitioner Lujan until Monday, January 16, 1978, or Tuesday, January 17, 1978.

The aforementioned notices of arraignment were sent by regular United States Mail to Petitioner Guillermo Lujan, 1600 N. Wilmont (sic), Tucson, Arizona, Petitioner Sunshine Bail Bond, 59 S. Scott, Tucson, Arizona, Walter B. Nash (Petitioner Lujan's counsel), 1210 Home Federal Tower, Tucson, Arizona, and to Petitioner Myrna Lujan,

c/o Walter B. Nash. The notices were not sent by certified mail or registered mail or by any other means whereby a return receipt could have been obtained. In addition, there was no record made whatsoever in these proceedings that the Petitioner Guillermo Lujan or any other Petitioner had any actual prior notice of the January 19, 1978, arraignment date.

The Petitioner Lujan did not appear at the arraignment on January 19, 1978, and a warrant for his arrest was issued. Subsequently, the Government filed a Motion for Entry of Judgment by Default of the Bond for his failure to appear at the date for arraignment only in CR-77-483. No such order was sought with regard to CR-77-484. However, the appeal and this Petition were filed as to both cases.

It should be noted that the week prior to the date of arraignment, to-wit:

January 8, 1978, through and including January 14, 1978, Petitioner Lujan, in compliance with the conditions of his release, had called his attorney's office.

On February 13, 1978, a hearing was had on the Government's Motion and testimony was taken by way of a stipulated statement given by Walter B. Nash III, attorney of record for Petitioner Guillermo Lujan, as to certain facts. Judgment was entered against all Petitioners on that same date. The Ninth Circuit Court of Appeals affirmed the judgment and denied rehearing.

THE FEDERAL QUESTION IS SUBSTANTIAL AND AS
YET UNRESOLVED BY THIS COURT

The forfeiture of the bond herein based upon Petitioner Guillermo Lujan's failure to appear at his third arraignment without his receiving any actual or implied notice

thereof poses a substantial federal Constitutional issue which has not been resolved by this Court.

It is respectfully submitted that before the Court can forfeit any bond whatsoever in a criminal proceeding that it is incumbent upon the Court to demonstrate that the non-appearing individual had notice of that proceeding. In the case at bar, there is no showing whatsoever in the record that Petitioner Guillermo Lujan had any actual notice whatsoever that he was to appear at the arraignment on January 19, 1978.

It is conceded that under certain circumstances notice of a proceeding can be implied. See Western Surety Company v. United States, 51 F.2d 470 (9th Cir. 1931). However, none of those circumstances are present in this case.

This criminal proceeding is unusual in that there were three indictments and three separate arraignments in each case. If, in fact, Petitioner Guillermo Lujan failed to appear at the first arraignment following his release from custody, it would be reasonable to infer that he should have known that an arraignment would have been forthcoming and his attendance required. However, due to the unusual multiple indictment and arraignment practice followed by the Government in this case, no such inference may be drawn.

The manner of notification that the Government sought to utilize in this case consisted of simply depositing the notices of arraignment into the United States mail. It was not received by Petitioner Guillermo Lujan's counsel until January 16 or 17, 1978. This would have been during the same week that the arraignment was set. There

is no showing in the record that Petitioners Guillermo Lujan, Sunshine Bail Bond, and/or Stuyvesant Insurance Company received said notice. Petitioner Myrna Lujan would have received constructive notice at the same time that Petitioner Guillermo Lujan's attorney received it due to the fact that it was mailed to her in care of him.

Since the Government has not demonstrated that any Petitioner had any actual or implied knowledge of the required appearance on January 19, 1978, no order forfeiting the bond for Petitioner Lujan's failure to appear at that proceeding can be valid.

In this regard it should also be noted that Petitioner Guillermo Lujan had been in compliance with his conditions of release with regard to contacting his attorney for the week prior to the week during which the

arraignment notice was received and during which the arraignment was set. Even if he had not been in contact properly with his counsel during that period, he still cannot impliedly be charged with having notice of an arraignment date, notice for which was not even received during that same week. Furthermore, since the arraignment was on Thursday, prior to the noon Friday deadline for contacting counsel, Petitioner Guillermo Lujan was still in full conformity with the conditions of release at the time of the January 19, 1978, arraignment.

It is interesting to note that in both CR-77-483 and CR-77-484 the Government sought to proceed to trial as to the Petitioner Lujan in absentia. This point was opposed by Petitioner Guillermo Lujan's counsel, who filed a Motion for Severance and Continuance, due to the fact that he had not been arraigned (due to the lack of notice problem) on the indictment that the trial was to be

based upon. The Court in CR-77-484 granted Petitioner Guillermo Lujan's motion for severance and for continuance and did not allow him to be tried in absentia. At the time of the hearing on the same motion in CR-77-483, the Governor withdrew its opposition and a similar order was entered. It is respectfully submitted that this situation is analagous to the bond situation at issue herein and that a similar result should obtain.

CONCLUSION

Petitioners submit that this Court should grant Certiorari herein.

RESPECTFULLY SUBMITTED this 24 day of May, 1979.

By Walter B. Nash III
Walter B. Nash III
1210 Home Federal Tower
32 N. Stone Avenue
Tucson, Arizona 85701
Attorney for Petitioners

APPENDIX

F I L E D

DEC 11 1978

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Appellee,)	No. 78-1763
)	
vs.)	<u>O P I N I O N</u>
)	
GUILLERMO LUJAN, MYRNA)	
LUJAN, SUNSHINE BAIL)	
BONDING COMPANY and)	
STUYVESANT INSURANCE)	
COMPANY,)	
)	
Appellants.)	

*Appeal from the United States District
Court for the District of Arizona

Before: ANDERSON and HUG, Circuit Judges,
and REAL,* District Judge

*The Honorable Manuel L. Real, United
States District Judge for the Central
District of California, sitting by designation.

ANDERSON, Circuit Judge:

Appellants bring this appeal challenging the judgment of the district court ordering the forfeiture of Guillermo Lujan's release bond.

Appellant Guillermo Lujan and several other individuals were indicted in two different drug conspiracy cases on November 29, 1977. Lujan was released after posting a \$30,000.00 bond. Appellant Sunshine Bail Bonding Company, on behalf of the appellant Stuyvesant Insurance Company, posted a \$15,000.00 surety bond, and appellant Myrna Lujan posted a \$15,000.00 cash bond.

Under the terms of his release Lujan was required to appear at his arraignment on December 8, 1977, "and at such other places and times as the United States Magistrate or Court may order or direct." (C.R. 9) Lujan was further required under

the order of release to "contact his attorney either in person or by personally telephoning him at least once each week no later than 12:00 noon each Friday."

(C.R. 9) Lujan appeared on December 8, 1977, as directed, and the trials in the two cases were set for January 18, 1978 (Trial I) and January 31, 1978 (Trial II).

On December 13, 1977, a superseding indictment (substantially identical to the original) was filed in both cases. On December 14 and December 15, 1977, notices were filed setting December 20, 1977, as the date for arraignment on the superseding indictment. Lujan appeared as required, and the previously set trial dates were confirmed.

On January 3, 1978, several motions were heard in one of the cases. The trial date of January 18, 1978, was vacated, and Trial I was reset for February 14, 1978.

Lujan was not present at the hearing on these motions.

On January 9, 1978, several motions were being heard in court and again Lujan was not present. The court gave Lujan's attorney until noon the next day to contact him. After being advised by the attorney that he had been unable to reach him, on January 10, the court issued a bench warrant for Lujan's arrest. The court also reset the date for Trial II to February 22, 1978.

On January 10, 1978, the government filed a second superseding indictment, again substantially identical to the original. Notices setting the arraignment for January 19, 1978, were mailed on January 12, 1978, to Lujan personally, Lujan's attorney, appellant Myrna Lujan, and appellant Sunshine Bail Bonding Company. Lujan's attorney received a copy of the notice on either Monday, January 16, or Tuesday,

January 17. Lujan did not appear at the arraignment on January 19, and a second bench warrant was issued.

On February 13, 1978, a hearing was held on the government's motion for entry of judgment by default of bond. The court entered judgment against all appellants and ordered forfeiture of the \$30,000.00 bond for Lujan's failure to appear at the January 19 arraignment. Lujan did not appear at the January 19 hearing, and there is no evidence that he has resubmitted himself to the jurisdiction of the court. Lujan, Myrna Lujan, Sunshine Bail Bonding Company, and Stuyvesant Insurance Company now appeal the judgment ordering forfeiture. The issue on appeal is their contention that Lujan was not given reasonable notice that he was required to appear, so that due process requires reversal.

The appellant Guillermo Lujan has no

standing to appeal the order forfeiting his bail for his failure to appear in court since he is a fugitive and has failed to resubmit himself to the court's jurisdiction. United States v. Villegas-Codallos, 543 F.2d 1124, 1125 (9th Cir. 1976). The appeal of Guillermo Lujan is therefore dismissed.

We need not decide the constitutional question of whether due process requires reasonable notice to a defendant of a required court appearance before there can be a forfeiture of his release bond. On the facts of the present case, we hold that the notice given to Lujan of his January 19 arraignment was reasonable.

A bail bond is a contract between the government and the defendant and his surety, the forfeiture of which results in the surety becoming the government's debtor.

United States v. Plechner, 577 F.2d 596, 598 (9th Cir. 1978). The language of the bond contract is strictly construed in accordance with the terms contained therein. United States v. Marquez, 564 F.2d 379, 380 (10th Cir. 1977). When there is a breach of a condition of the release bond, the district court shall declare a forfeiture. Fed. R. Crim. P. 46(e)(1).

As Appellants acknowledge, the government does not have to prove actual notice to the defendant since in many cases, such as the present where the defendant remains a fugitive, it would place an extremely difficult burden on the government.

Initially, we note that a defendant who is released on bail has a general obligation to keep in touch with his attorney and the court, as well as being present at the court proceedings against him. Western Surety co. v. United States, 51 F.2d 470, 472 (9th Cir. 1931). Lujan's release order

required him to appear at such times as the court directed and to remain in personal contact with his attorney. He did not appear on January 10 as the court had ordered. Notice of the January 19 arraignment was mailed to Lujan and his attorney one week prior to the date set for that appearance. Both Lujan and his attorney were within the same county as the court. Lujan's attorney actually received notice at least two or three days prior to the 19th. Although regular mail may not be the best mode of providing notice, it certainly is acceptable under the Federal Rules.¹ At the time of Lujan's forfeiture, there was already a bench warrant outstanding against

¹ Service on the defendant or on his attorney in a criminal case can be made in the manner provided for civil matters. Fed. R. Crim. P. 49(b). Under the Federal Rules of Civil Procedure, service can be made by regular mail. Fed. R. Civ. P. 5(b).

him since his failure to appear on January 10. And, at the time the district court entered its order of forfeiture on February 13, Lujan had not resubmitted himself to the jurisdiction of the court. On the facts of the present case, we are convinced that the notice given to Lujan was reasonable.

The judgment of the district court ordering forfeiture is AFFIRMED.

NO.

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SUPREME COURT OF THE UNITED STATES
October Term, 1978

GUILLERMO LUJAN, MYRNA LUJAN, SUNSHINE
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INSURANCE COMPANY,

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vs.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

WALTER B. NASH III, being first duly
sworn, deposes and says:

That in accordance with Rule 33(2)(a),
Supreme Court Rules, he has served a copy
of the following documents on the United
States Attorney for the District of
Arizona, Tucson, Arizona, and has forwarded
by air mail three copies of the following

documents to the Solicitor General,
Department of Justice, Room 5614, Washing-
ton, D.C., 20530, on this 30 day of
May, 1979.

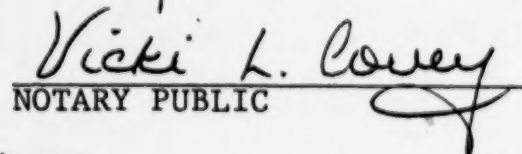
(1) Petition for Writ of Certiorari
to the Supreme Court of the United States
and attachments thereto;

(2) Affidavit of Service; and

(3) Appearance of Counsel.


WALTER B. NASH III

SUBSCRIBED AND SWORN to before me at
Tucson, Arizona, by WALTER B. NASH III,
this 30 day of May, 1979.


NOTARY PUBLIC

My Commission Expires:

My Commission Expires December 6, 1982

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

GUILLERMO LUJAN, MYRNA LUJAN, SUNSHINE
BAIL BONDING COMPANY, and STUYVESANT
INSURANCE COMPANY,

Petitioners,

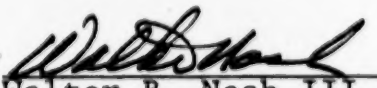
vs.

UNITED STATES OF AMERICA,

Respondent.

APPEARANCE OF COUNSEL

The Clerk will enter my appearance as
counsel for the Petitioners.

By 
Walter B. Nash III
1210 Home Federal Tower
32 N. Stone Avenue
Tucson, Arizona 85701

The Clerk is requested to notify
counsel of action of the Court by means of
Airmail Letter.